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Supreme Court of the United States

OCTOBER TERM, 1958

No. 935

JOSEPH RICCOBONO,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

A petition is here sought for a writ of certiorari to the New York Court of Appeals to review an order of that Court, entered March 13, 1959; which unanimously affirmed without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on December 9, 1958 (955).* That Court in turn had unanimously affirmed, with an opin-

*Numerals in parentheses refer to folio numbers in the consolidated record on appeal.

ion by Bastow, J. (98, *et seq.*; and see Petition, Appendix, page 11), an order of the Supreme Court of New York County, entered August 13, 1958 (52g). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing petitioner to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting," which had been held in New York at Apalachin, Tioga County. On April 9, 1959, the Court of Appeals amended its remittitur upon petitioner's application so as to define the precise questions considered (Petition, page 2).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August 1958. In the New York courts the appeals of all seven were consolidated. Petitioner and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

As of this date Michele Miranda, one of the other six persons so incarcerated, separately has petitioned this Court for a writ of certiorari to the New York Court of Appeals for review of the affirmance of his order and warrant of commitment; his petition was docketed on May 5. Another recalcitrant witness, Rosario Mancuso, separately has instituted an appeal to this Court from the decision of the New York Court of Appeals. A fourth, Paul Castellano, separately has filed both a notice of appeal and a petition for a writ of certiorari for review of the New York Court of Appeals decision affirming his incarceration. Both were docketed on May 22. An

application by Castellano for bail pending appeal was denied by Mr. Justice Harlan on May 4, 1959.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission:

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York. Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York State Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.
>
> "This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar

Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

"Section 2(1)(a) The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*

"(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

"(c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth in the Appendix to the Petition at page 26, *et seq.*

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who reside in various sections of this country and abroad. Petitioner and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by which petitioner and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara*

on or about November 14, 1957, at Apalachin, Tioga County, State of New York." (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including petitioner (191, 282, 382, 478, 588). The statement read, in part, as follows:

> "*In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*
>
> "We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes, were committed or planned at this meeting.
>
> "Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (386).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Petitioner's Conduct Before the Commission.

An individual hearing was held for petitioner before the Commission. A similar pattern of events occurred regarding petitioner and the other witnesses during their respective Commission hearings.

Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g., 360; 797).

Questions were directed to petitioner by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (389-412). Other than merely identifying himself (389-390), petitioner refused to answer these questions (390-412). His refusals were based on his privilege against self-incrimination and numerous other alleged general and technical grounds (391-393).

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon petitioner and the others (412-416). The Commission's action and the effect of its decision regarding immunity were clearly explained to petitioner, as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (417-420).

After this instruction the same questions were repeated by the Commission (432, *et seq.*). As did the others, petitioner again refused to make any answer (432, *et seq.*) on the basis of several alleged grounds, including the privilege against self-incrimination contained in both the New York and United States Constitutions (433-435).

On behalf of the Commission the Chairman then specifically directed and ordered petitioner to answer the questions as they were put to him (436, *et seq.*). Petitioner nevertheless persisted in his refusal to answer (443, *et seq.*).

After petitioner had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (473-476).

The Hearings in the Trial Court.

After petitioner's separate hearing was adjourned by the Commission, pending further proceedings, an order was obtained and served personally on petitioner directing him to appear before the New York Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Petitioner was the third recalcitrant to appear before Mr. Justice Spector, then sitting in the motion part of the trial court, to explain his refusal to tes-

tify; two other witnesses were heard and committed on August 12. Petitioner was heard and committed on August 13.

The trial court offered petitioner full opportunity to explain why he had refused to testify. Petitioner's counsel took complete advantage of this opportunity and made extensive argument and factual representations (793-846). Furthermore, each of the two witnesses who preceded petitioner had raised the same legal objections that petitioner raised, and now raises, and the same judge who committed petitioner had heard and passed upon these similar arguments (682, 750, 751-792).

Before petitioner's judicial hearing, the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. The Court stated its findings were based on a study of the transcript (822-825), which was very short and easily understood. After full argument as described above, the Commission's application was granted by the Court (830-831); and the warrants executed.

* * * *

Since his commitment, petitioner has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court, or to the present, has petitioner given any indication of a desire to answer the Commission's questions. Upon truthfully and responsively answering the questions put to him, petitioner

may secure his release pursuant to law (e.g., 52g [order], and 115 [warrant]).

Questions Presented

1. Does the duty of a state law enforcement agency to apprise federal law enforcement authorities of such violations of federal law as it discovers in the course of its investigations thereby convert the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, a prohibition against action by the national government only, into a prohibition against action by the state government after immunity has been conferred by the state upon petitioner?

2. Was the state trial court's refusal to grant petitioner's request for a hearing adjournment such an abuse of its discretion as to deprive petitioner of the due process protections guaranteed by the Fourteenth Amendment to the United States Constitution, where petitioner was offered full opportunity to present argument, and the state courts have unanimously upheld the manner by which the trial court acted in accordance with the state civil procedure?

* * * *

Petitioner here raises an alleged third issue that "the over-all effects of the proceedings violate due process and constitute cruel and unusual punishment" (Petition, page 19). The Commission is uncertain as to the legal theory so advanced, or the seriousness with which it is urged, for among other reasons no

witness before the Commission since its inception—including petitioner—has complained of the procedure by which the Commission conducted its hearings. Accordingly, no response is made to this specious "question". At best it is no more than a combination of arguments already offered respecting petitioner's federal privilege against self-incrimination and his rejected request for an adjournment, plus some window dressing. In any event petitioner has failed to indicate how this issue was timely raised in the state courts, particularly since it was in no way raised in the trial court or on the first appeal in the New York courts.

Argument

Petitioner has chosen to adopt *in toto* the legal argument presented to this Court in the Petition for a Writ of Certiorari filed by Michele Miranda (October Term, 1958, No. 893). In the interest of brevity, therefore, the Commission will incorporate by reference its response to the argument of Michele Miranda contained in the Commission's Brief in Opposition to Miranda's Petition.

This Court's decision in *Mills* v. *Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959), and the slight factual differences between the cases of Miranda and petitioner, require only a brief supplement to the Commission's response in that case.

POINT I

Petitioner's rights under the Fifth Amendment to the United States Constitution were not infringed and cannot be prejudiced by this state proceeding.

The Commission's argument on this point is set forth at pages 11 to 15 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (October Term, 1958, No. 893).

This Court's decision in *Mills v. Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959), must end any lingering speculation by petitioner that either federal-state cooperation, assuming it exists, or imminence of federal prosecution will make the federal privilege against self-incrimination applicable to state proceedings.

The facts in *Mills* were stipulated. The cooperation there admitted was significant and an accomplished fact. It did not consist of merely a statutory duty or authority to cooperate, which is the most petitioner may demonstrate here.

Furthermore, the danger of federal prosecution in *Mills* was imminent. Indictments against persons implicated had already been returned. A grand scale federal investigation by the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service, was in full swing. And as Mr. Chief Justice Warren noted in his dissenting opinion: "Doubt which might have existed concerning federal

interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years" (27 U. S. L. W. at 4421).

This Court held neither of these factors converted the Fifth Amendment into a prohibition against the states or state action in enforcement of its fundamental police powers.

POINT II

Petitioner was accorded full due process protection during this proceeding.

The Commission's argument on this point is set forth at pages 16 to 19 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (No. 893).

There are minor factual differences between the trial court hearings of petitioner and Miranda. These differences, however, do not affect the legal position of either. They have not been denied adequate due process protection, and their claims concern minutiae of state civil procedure which have been decided unanimously against them by the appropriate forum—the state's highest courts. Miranda is precluded from successfully establishing a due process claim because of his deliberate waiver of his right to contest on the merits by virtue of his special appearance. Petitioner, on the other hand, chose to avail himself of his opportunity for a hearing. He made extensive legal argument and offered factual representations; that they

did not persuade and are unsubstantial is not a deprivation of due process.

Petitioner's argument before the trial court makes it perfectly clear that the main purpose, if not the only purpose, of his requested adjournment was to await review by an appellate court of the commitments of prior recalcitrant witnesses. As was pointed out in the Commission's response to Miranda, even if the purpose of the adjournment was to secure more time to contest on the merits, the trial Court's decision here in denying such a request in the exercise of its discretion would not amount to a deprivation of a fair hearing. *A fortiori*, refusal to grant an adjournment to wait appellate review in related cases cannot have denied petitioner his fair hearing or under any analysis rise to the dignity of such a deprivation of due process as to call for action by this Court. At best all that could happen is that the matter would be sent back to the trial court and inquiry made there as to whether petitioner refused to answer the questions put to him—an admitted fact.

Moreover there can be no serious claim of deprivation of rights on the ground of surprise for two additional reasons. At the hearings petitioner was represented by counsel, and came fortified with prepared legal statements drawn in advance of the hearings, as did Miranda. Similarly, petitioner's attorney attended all prior proceedings resulting in the commitment of two other recalcitrant witnesses, thereby apprising himself of the legal consequences which might, and did in fact, result from his client's refusal to testify. Petitioner consciously and stoically made his choice: he was bound to defy this lawful inquiry and the

Court even if it meant his imprisonment. No amount of rhetoric can avoid that obvious truth.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

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